United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

74-2081

United States Court of Appeals

For the Second Circuit

Docket No. 74-2081

ROBERT L. SCHWARTZ, RICHARD F. KNAPP, RUDOLPH J. MUELLER, LAWRENCE F. McGIVNEY, SIDNEY J. HELLER, GARBIS G. TAKESSIAN, NORBERT W. DOYLE, STANLEY F. POPEIL, WILLIAM E. LANGE, E. LEE MULLER, ROBERT E. McDONNELL, III and JOHN F. SWAN,

Plaintiffs-Appellants,

against

McDONNELL & CO., INCORPORATED, T. MURRAY McDONNELL, MORGAN McDONNELL, EDWARD F. BECKER, FRANK V. DEEGAN, WILLIAM J. CORBETT, RAYMOND J. DOYL, JR., HUBERT McDONNELL, JR., JOHN J. DELLASSANDRO II, and NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

PETITION OF PLAINTIFFS-APPELLANTS FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

RABIN & SILVERMAN
Attorneys for Plaintiffs-Appellants
80 Broad Street
New York, N. Y. 10004
212-248-6490

I. STEPHEN RABIN
of Counsel

UNITED STATES COURT OF APPEALS
FILED
MAR 4 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PETITION OF PLAINTIFFS-APPELLANTS
FOR REHEARING AND SUGGESTION
FOR REHEARING IN BANC

Plaintiffs-Appellants, pursuant to Rule 35 and 40 of Federal Rules of Appellate procedure, petition for rehearing of the Court's opinion and decision of January 28, 1974 which affirmed from the bench Judge Pierce's dismissal of this action for counsel's inadvertent failure to attend a Magistrate's pre-trial conference and their alleged failure to complete discovery, although they needed and wanted no further discovery and were ready for trial.* Chief Judge Kaufman and Judge Mansfield affirmed, and Judge Oakes dissented. A copy of the opinion is annexed as an Appendix.

The decision, it is respectfully submitted, should be heard in banc because it is in conflict with previous decisions of this Court and because it involves a question of exceptional importance: whether negligence, inadvertence, or even poor judgment on the part of counsel justifies depriving plaintiffs of their day in court.

*The time to petition for rehearing was extended to fourteen days after receipt of the transcript of the Court's decision. The transcript was received on February 18, 1975.

Nature of the Case and Prior Proceedings

This action involves the purchase by the twelve plaintiffs of common stock of McDonnell & Co. Incorporated ("McDonnell"), a former member of the New York Stock Exchange. Plaintiffs allege that they invested $170,400 in McDonnell between October, 1968 and January, 1969, on the basis of false representations and financial statements which led them to believe that McDonnell was flourishing when in fact it was desperately trying to raise capital to stay afloat. Nine months later, McDonnell was insolvent and plaintiffs' investment was totally lost. They brought this action under the Federal Securities laws to recover.

At the time of the dismissal below, plaintiffs had completed their discovery as a result of, among other things:

(a) Rule 34 production of approximately 3200 documents for McDonnell and the Exchange,

(b) Forty-two transcripts of depositions taken in two related cases prosecuted by another law firm and which were the subject of a stipulation between plaintiffs and McDonnell and the Exchange allowing the depositions to be utilized in this case,

(c) Transcript of an extensive arbitration, before the American Stock Exchange, prosecuted by plaintiffs' counsel, Rabin & Silverman, involving many of the same defendants and the same issues.

Mr. Kresge's Error

Mr. Kresge, plaintiffs' prior attorney, had inadvertently missed a calendar review call on January 30, 1973. On his motion, it was restored to the calendar on condition that he personally pay $950 to defendants' counsel. Mr. Kresge personally made that payment.

The order of restoration directed that a rigid schedule be set by the Magistrate "by which the parties [were] to complete all discovery" and "that no further adjournments or deviations from the prepared schedule be permitted to the plaintiffs, except for extreme good cause shown". At a conference held on November 21, 1973, the Magistrate directed that plaintiffs' discovery be completed within six months, or by May 20, 1974, and that a progress report be rendered at a conference to be held on May 17, 1974.

By the fall of 1973, Mr. Kresge had been replaced by Rabin & Silverman as the attorneys for the plaintiffs. Mr. Kresge was an associate professor of law at Ohio Northern University from September, 1973 to July, 1974.

Mr. Greenberg's Error

Mr. Greenberg of Rabin & Silverman inadvertently failed to attend the pre-trial conference on May 17, 1974. He had neglected to put the date of the conference in his calendar and had also believed that defendants' pending motions for summary judgment had suspended the conference. Had Mr. Greenberg attended the pre-trial conference, he would have informed the Magistrate that discovery had been completed. In any event, there seems to be no question that if additional time had been requested for discovery, the Magistrate would simply have denied the request, and proceeded to set a schedule of discovery for defendants. There would have been no question of dismissal.

Judge Pierce, however, dismissed the action with prejudice and the opinion for which a rehearing is petitioned affirmed the dismissal.

The Opinion of the Court Overrules Two Prior Opinions of this Court that Nonwillful Conduct of Counsel Should Not Lead to Dismissal

A principal purpose of an in banc hearing is to provide for reconsideration of the conclusion on a question of

law of a panel of the Court when a later panel comes to the contrary conclusion.*

The decision of the panel here apparently repudiates the decisions of other panels, first, that dismissal is too harsh a remedy for defaults based on negligence, inadvertence, or poor judgment, when the conduct involved is not the equivalent of wilfullness or contempt, and second, that the sins of one attorney will not be visited upon the head of another. (The opinion of Chief Judge Kaufman is in error in suggesting that the same attorney, Mr. Kresge, erred twice. In fact Mr. Kresge's error took place on January 30, 1973, when he missed a special calendar call. At the time Mr. Greenberg missed the pre-trial conference - May 17, 1974 - Mr. Kresge was and had been teaching law in Ohio.)

Judge Waterman has stated the approach in this circuit in An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Incurring Compliance with Pre-trial Orders, 29 F.R.D.420, 424-426 (1962):

*E.g., United States v. Becker, 461 F.2d 230, 235 (2d Cir.1972), petition for cert.filed, No.72-158, July 28,1972; Tellier v. Commissioner of Internal Revenue, 342 F.2d 690,692 n.3 (2d Cir. en banc 1965), aff'd, 383 U.S. 687 (1966); Alexander, En Banc Hearings in the Federal Courts of Appeals:Accommodating Institutional Responsibilities, 40 N.Y.U. L.Rev. 563, 582 n.120 (1965).

"The sanctions of dismissal and of judgment by default are severe sanctions, and appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts. To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of cases.

"I suggest that appellate judges believe that a district judge should approach with hesitation the use by him of dismissal sanctions. Where an alternative, less drastic, sanction would be just as effective it should be utilized. For instance in United States v. Costello, 16 F.R.D. 428 (SDNY 1954), inasmuch as he believed that a default judgment would deprive Costello of U.S. citizenship without a hearing, the trial judge would not enter judgment for the Government by default even though Costello had refused to answer questions put to him at his pre-trial proceedings. Instead, Costello was declared to be in contempt - and was fined. Our appellate court agreed, 222 F.2d 656 (2 Cir.1955), cert.denied, 350 U.S. 847, 76 S.Ct. 62, 100 L.Ed. 755 (1955), that the lower court action was proper and just.

* * * *

"Lyford v. Carter, 274 F.2d 815 (2 Cir. 1960) (per curiam), and Syracuse Broadcasting Corp. v. Newhouse, 271 F. 2d 910 (2 Cir. 1959), are cases where district courts' dismissals pursuant to Rule 41(b) were held to be abuses of judicial discretion. In neither of these cases was the power of the district court under Rule 41(b) questioned, but in both of them the appellate court questioned the exercise of that power under the circumstances were present. My own belief relative to the proper function of the appellate court where an attack has been made upon the breadth of exercise of lower court discretion was expressed by me in Syracuse Broadcasting Co. v. Newhouse, supra, at 915, as follows:

> 'Of course, in view of its intimate knowledge of the facts, discretion must be accorded the district court in its resolution of these administrative problems. This of necessity must be so, but when we are convinced that the court below has exceeded a proper discretion in that the order imposed was too strict or was unnecessary under the circumstances, we would be remiss in our duties if we did not set that order aside.'"

Judge Oakes, it is respectfully submitted, in dissenting on the basis that Mr. Greenberg's failure to mark his calendar was a "nonwillful act", was correct in relying upon Judge Waterman's article.

Welden v. Grace Line, 404 F.2d. 76 (2d Cir.1968) also refused to dismiss for a "nonwillful act" and held that one attorney's default will not be attributed to another. There the same law firm missed two pre-trial conferences but since, among other things, there had been a turn-over of attorneys handling the case, this Court vacated the dismissal, characterizing counsel's second failure to attend the conference as "a good faith misunderstanding...and not an attempt on counsel's part to delay the proceedings or evade the orders of the Court."

In Peterson v. Term Taxi Inc., 429 F.2d 888 (2d Cir. 1970) although the failure of plaintiff and his counsel to appear for trial "demonstrate[d] a failure of good judgment on the part of both and their conduct...was an affront to the court," the

most "drastic remedy" available to the court - dismissal - was too harsh.

In short, conduct which is the result of a "misunderstanding" or even "a failure of good judgment" should not lead, in Judge Waterman's words, to the "drastic sanction" of dismissal.

Link v. Wabash R.R. 370 U.S. 626 (1962), cited by the majority, as Judge Oakes points out, involved a willful failure to appear. Counsel in fact informed the Judge that he would not appear. Theodoropoulos v. Thompson - Starrett Company, 418 F. 2d 350 (2nd Cir. 1950) and West v. Gilbert, 361 F. 2d 314 (2nd Cir. 1966) cert. denied, 385 U.S. 919 (1966) involved a willful failure to file a note of issue. In fact, Theodoropoulos involved two similar defaults by the same attorneys.

Conclusion

The Court's opinion is inconsistent with the standards set forth in Welden and Petersen, applied by Judge Oakes and enunciated by Judge Waterman. We therefore respectfully

suggest that the Court's opinion be reheard in banc and that Judge Pierce's opinion be reversed.

Dated: New York, N.Y.
March 3, 1975

Respectfully submitted,

RABIN & SILVERMAN
Attorneys for Plaintiffs-Appellants
80 Broad Street
New York, N.Y. 10004
212-248-6490

Of Counsel:
I. Stephen Rabin

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

----------x

SCHWARTZ, et al.,

Plaintiff,

v.

Docket No. 74-2081

McDONNELL & CO., INC., et al.,

Defendant.

----------x

Before:

HON.: IRVING R. KAUFMAN, Chief Judge, WALTER R. MANSFIELD, JAMES L. OAKES,
Circuit Judges,

New York, January 28, 1975.

Statement made by the court at disposition of appeal in open court.

CHIEF JUDGE KAUFMAN:

We have agreed after conferring on the bench to dispose of this case from the bench. Judge Mansfield and I, with Judge Oakes dissenting, affirm the decision below.

We recognize that the dismissal of an action is a harsh sanction, but it is apparent that it was properly invoked by Judge Pierce. The failure of plaintiffs' counsel Kresge to appear at the conference scheduled by Magistrate Raby was the second such infraction, and it occurred after Mr. Kresge and his clients had been given fair warning by Judge Stewart, after a previous dismissal for failure to appear had been set aside, that rigid compliance with scheduling orders would be demanded and that no adjournments would be given except for good cause.

Moreover, the excuses proffered by the plaintiffs for missing the conference are not only dubious on their face but also, in conjunction with the history of this case, justify the district court's refusal to give credence to the belated claim that no additional discovery was required. The question, as I see it, is not whether the plaintiffs really needed the additional discovery. It is clear that the judge, at that point, had ample reason for deciding that the claim that further discovery was not needed was an afterthought to forestall the dismissal because of the dilatory tactics, and therefore appropriately refused to give credence to it. Accordingly, Judge Mansfield and I agree that the sanction imposed here is well within the district court's discretion under Rule 41(b) particularly on the record that is presented in this case. Link v. Wabash R.R., 370 U.S. 626 (1962); West v. Gilbert, 361 F.2d 314 (2d Cir.), cert. denied, 385 U.S. 919 (1966).

JUDGE MANSFIELD: (Concurring)

I would like to add that in addition to the authorities mentioned by Chief Judge Kaufman, I would also rely upon our decision in Theodoropoulos v. Thompson-Starrett Company, 418 Fed. 2d 350 (1950).

JUDGE OAKES: (Dissenting)

I believe that the district court exceeded its discretion by dismissing for what I interpreted was a nonwillful

act - failure to attend a pre-trial conference by having neglected to put it in the calendar. I believe that a less drastic sanction would have been equally effective such as the imposition of even more substantial costs than in the previous case. I consider that Link v. Wabash Railroad is distinguishable primarily because it involved a directly willful act and I endorse the statement of Judge Waterman which is in 29 FRD 420 (1962).

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of New York) SS

SHELDON HELFMAN, being duly sworn, deposes and says that on the 4th day of March, 1975, he served two (2) copies of the within Petition of Plaintiffs & Appellants for Rehearing in Banc, upon each of the following Attorneys by depositing copies of same, enclosed in a post-paid wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office Department with the State of New York directed to said Attorneys at the address within the State designated by them for that purpose:

Milbank Tweed Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

Lunney & Crocco
20 Exchange Place
New York, New York 10005

Proskauer Rose Goetz & Mendelsohn
300 Park Avenue
New York, New York 10017

Reavis & McGrath
1 Chase Manhattan Plaza
New York, New York 10005

Burns Kennedy Shilling & O'Shea
598 Madison Avenue
New York, New York 10022

Deponent is over the age of twenty-one years.

Sheldon Helfman

Given to before me this 4th
day of March, 1975

Milton C. Winkler

MILTON C. WINKLER
Notary Public, State of New York
No. 31-0704765
Qualified in New York County
Commission Expires March 30, 1976

communicated their acceptances

72. The Exchange by means of its authority and power

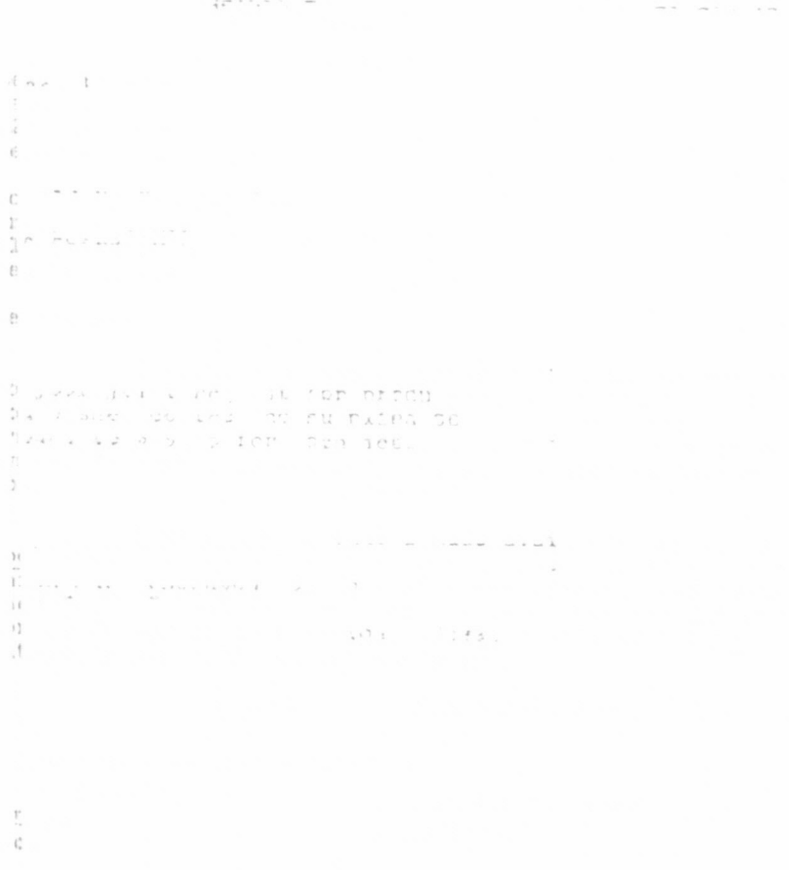
76. The above approvals, sanctioning and ratifications by the Exchange constituted representations by the Exchange

deponent served the within

upon

the herein, by delivering a true copy thereof to h personally. Deponent knew the

Sworn to before me, this day of 19



General Rule 23, had published in the New York Law Journal notice

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the call of the Special Review Calendar (a copy of the Law urnal notice is appended hereto as Exhibit A). This notice ly appeared in the Law Journal on the following four dates:

January 25, 1973
January 26, 1973
January 29, 1973
January 30, 1973

earlyplaintiffs' counsel received notice of the call.

4. This action is over two years old, based on claims er four years old, and despite plaintiffs' attorney's aver- nts, no discovery under the Federal Rules of Civil Procedure as taken place. There are apparently two other actions pending this Court in which pre-trial discovery may be taking place. Supporting Affidavit of Donald M. Kresge, sworn to April 2, 1973, . 5). Defendant T. Murray McDonnell is not a party in either ction nor has this firm been noticed for any discovery in any uch actions. This argument of plaintiffs' counsel is frivolous nd he is merely attempting to create a facade of activity out f the efforts of counsel in other actions not relevant to this ction.

5. Plaintiffs' counsel also states that defendants ill not be prejudiced if the order of dismissal is vacated. ounsel's analysis of this point is similar in quality to the anner in which he has prosecuted this action. Defendant T. urray McDonnell will be severely prejudiced by the vacation of he dismissal order in that the statute of limitations has run efinitely on the Second, Third and Fourth Counts and probably n the First, Fifth, and Sixth Counts. The only other count in he complaint against defendant T. Murray McDonnell is based on ommon law principles (Seventh Count) and, therefore, if the otion to vacate is denied, that claim can only be prosecuted in state court proceeding.

6. Plaintiffs' counsel further claims that the order

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Notary Public

Reg. 31-5736080 Qual. in N. Y. Co.
Commission Expires March 30, 1972

165a

NEW YORK STOCK EXCHANGE

ELEVEN WALL STREET

NEW YORK, N.Y. 10005

F MEMBER FIRMS
OF FINANCE

March 18, 1969

cDonnell & Co. Inc.
20 Broadway
ew York, New York 10005

ttention: Mr. Thomas A. McKay

entlemen:

Acknowledgment is made of your corporation's esponse to the special financial questionnaire as of anuary 30, 1969.

While the details regarding the answers to arious questions will be the subject other correspondence, it is our desire to advise you that the analysis of he response disclosed the following:

Aggregate Indebtedness - $118,265,000
Net Capital - $3,968,000
Ratio - 2981%
Firm Commitments - $23,802,000

ased on the above stated aggregate indebtedness, you were equired to maintain a minimum net capital of $5,913,250 nder the provisions of Rule 325, hence, the analysis shows n apparent deficit of $1,945,250.

You, of course, are aware of our previous correspondence concerning the corporation's capital deficiency s disclosed by the analysis of the audited response of ctober 31, 1968. Pursuant to your letter of January 30th, e understand the corporation received additional securities ith a combined c pital value of $950,000. However, while his amount was considered sufficient to meet capital requirements based on the October response to the questionnaire, it appears the corporation's position changed to the extent

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the defendants, on or before [illegible] on the [illegible] day of [illegible], 1973, be deemed sufficient service.

Issued at [illegible] P.M., April [illegible], 1973.

SO ORDERED:

Dated: [illegible]

[illegible]
U.S.D.J.

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S DISTRICT COURT
TRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

WARTZ, et al.,

Plaintiffs,

-against-

O., INCORPORATED, et al.,

Defendants.

(L.W.P.)

71 Civ. 1281

AFFIDAVIT IN SUPPORT OF MOTION

- - - - - - - - - - - - - - - - x

YORK)
: ss.:
YORK)

ALD M. KRESGE, being duly sworn, deposes and says:

m attorney for the plaintiffs in the above entitled litigation, nd am associated with the firm of Goldstein, Shames & Hyde.

ake this affidavit in support of plaintiffs' motion, pursuant to eneral Rule 23 of this Court and Fed. R. Civ. P 60(b), to have vacated the dismissal of this case for lack of prosecution, which dismissal was ordered by the Honorable Lawrence W. Pierce on February 8, 1973, and to have the case restored to the Special Review Calendar.

The dismissal was without prejudice and was pursuant to General Rule 23 of this Court. No one appeared on behalf of plaintiffs when the case was called on January 30, 1973.

The order dismissing the case reads as follows:

> "The above entitled cause having been called on a Special Review Calendar January 30, 1973, under General Rule 23 of this Court, and no one appearing in opposition, it is now ORDERED that the above entitled cause be dismissed for lack of prosecution, under said Rule, without prejudice and without costs."

EXHIBIT A

The following papers considered by me on this motion are forwarded herewith:

1. Order to show cause dated 4/3/73 and filed 4/4/73.

2. Motion and affidavit filed October 12, 1973 on behalf of New York Stock Exchange for award of counsel fees for Milbank, Tweed, Hadley & McCloy.

3. Affidavit sworn to October 20, 1973 in support of award of counsel fees to Proskauer Rose Goetz & Mendelsohn, Esqs., attorneys for defendant Stargatt.

4. Affidavit sworn to October 17, 1973 in support of application for counsel fees on behalf of Lunney, Downey & Crocco, Esqs., attorneys for defendant McDonnell.

5. Affidavit sworn to October 19, 1973 in support of application for counsel fees on behalf of Burns Kennedy Schilling & O'Shea, Esqs., attorneys for defendant Becker.

(There has also been filed with the Clerk of the Court an affidavit in support of an application for counsel fees to the firm of Reavis and McGrath, Esqs., counsel for the defendant Corbet, a copy of which was exhibited to me at the hearing on November 18th, but which is not forwarded herewith.)

6. Affidavit in opposition of Donald M. Kresge, sworn to November 16, 1973.

7. Plaintiffs' memorandum in opposition.

I should also state on the record that, pursuant to the directive of Judge Stewart, I directed that all plaintiffs' discovery be completed not later than six months from the date hereof, and that defendants' discovery be completed not later than September 1, 1974. I further directed that counsel appear at a conference at my office on May 17, 1974 for a report on the progress of discovery.

Dated: New York, N.Y.
November 21, 1973.

Respectfully submitted,

Harold J. Raby

HAROLD J. RABY
UNITED STATES MAGISTRATE

MEMO ENDORSED

181a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al., Plaintiffs, -against- McDONNELL & CO., INCORPORATED, et al., Defendants.	71 Civ. 1281 (L.W.P.) NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, upon the accompanying legal memorandum and all proceedings heretofore had herein, defendant New York Stock Exchange, Inc. will move this Court on submission, at the United States District Court House for the Southern District of New York, Foley Square, New York, New York, at a date to be fixed by the Court, for leave to file an amended answer to the complaint in the form attached hereto, pursuant to Rule 15(a) of The Federal Rules of Civil Procedure, and for such other relief as to the Court may seem just and proper.

Dated: New York, N.Y.
December 10, 1973

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A member of the firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for defendant
New York Stock Exchange, Inc.

TO:

Donald M. Kresge
c/o Rabin & Silverman
80 Broad Street
New York, N.Y. 10004

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Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

- v - : 71 Civ. 1281

MC DONNELL and COMPANY INCORPORATED, et al.,

Defendants.

APPEARANCES:

DONALD M. KRESGE, ESQ.
c/o RABIN & SILVERMAN
80 Broad Street
New York, New York 10004

Attorney for Plaintiff

FRANK GREENBERG, ESQ.
RABIN & SILVERMAN
80 Broad Street
New York, New York 10004

PROSKAUER, ROSE, GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

Attorneys for Defendant McDonnell & Co., Inc. (in Receivership)

MILBANK, TWEED, HADLEY & MC CLOY
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendant New York Stock Exchange, Inc.

7675

LUNNEY & CROCCO
20 Exchange Place
New York, New York 10005

Attorneys for Defendant T. Murray McDonnell

BURNS, KENNEDY, SCHILLING & O'SHEA
598 Madison Avenue
New York, New York 10022

Attorneys for Defendants Hubert McDonnell, Jr. and Edward F. Becker

REAVIS & MC GRATH
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for William J. Corbett, Sr.

LAWRENCE W. PIERCE, D.J.

ORDER

This matter was referred to Magistrate Raby for hearing and recommendation as to the amount of defendants' costs and attorneys' fees to be assessed against plaintiff's counsel personally, related to plaintiff's motion to vacate the Order of Dismissal dated February 28, 1973. This Court has studied the Magistrate's report and the extensive submissions from the parties in response to the Magistrate's recommendation.

Given all the circumstances, and the nature of counsel's neglect, and the nature of the legal work involved in the opposition to his motion to vacate the dismissal, this Court hereby adopts so much

of Magistrate Raby's report dated November 21, 1973, as pertains to work and services expended by defendants in connection with the plaintiff's motion to vacate and modifies the assessments as follows:

	Name of Firm	Amount of Award
1.	Milbank, Tweed, Hadley & McCloy, Esqs., counsel for defendant New York Stock Exchange, Inc.	$250.00
2.	Proskauer Rose Goetz & Mendelsohn, Esqs., counsel for the defendant McDonnell & Co., Inc. (in Receivership).	50.00
3.	Lunney, Downey & Crocco, Esqs., counsel for defendant T. Murray McDonnell.	250.00
4.	Burns Kennedy Schilling & O'Shea, counsel for defendants Becker, and Hubert McDonnell	250.00
5.	Reavis and McGrath, Esqs., counsel for defendant Corbet.	150.00
	Total	$950.00

The amounts set forth above shall be paid on or before April 30, 1974, and unless a Certificate confirming said payments is filed with Magistrate Raby on or before April 30, 1974, the Clerk shall enter judgment dismissing the complaint, with costs.

SO ORDERED.

Dated: New York, New York
March 29, 1974

LAWRENCE W. PIERCE
U. S. D. J.

16

JUL 1 1974
S D OF N Y

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-v-

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

----------x

71 Civ. 1281 (LWP)

REPORT OF UNITED STATES MAGISTRATE

MICROFILM
JUL 1974

TO THE HONORABLE LAWRENCE W. PIERCE, U.S.D.J.:

Pursuant to your direction, the Honorable Charles E. Stewart, Jr., District Judge of this court, signed and filed an order on July 19, 1973, in which the following action was taken:

1. A motion by the plaintiff to vacate a prior dismissal order was granted, subject to the terms and conditions hereinafter set forth;

2. This case was referred to the undersigned Magistrate "for the preparation of a rigid schedule, setting forth the dates by which the parties are to complete all discovery and for the preparation of a pre-trial order";

3. Pursuant to the procedure followed in the case of Schwartz v. United States, 384 F.2d 833, at 836, the Court imposed "the costs and attorney fees of this motion against plaintiffs' counsel personally".

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In compliance with item #3, supra, of this Court's July 19, 1973 direction, I rendered a report dated November 21, 1973 in which I recommended imposition of costs in the amount therein stated; and that report was thereafter confirmed by you, with certain monetary modifications, by order dated March 29, 1974. I was thereafter advised that in compliance with your order of March 29, 1974, a certificate attesting to the payment of the aforementioned costs was filed with the Clerk of the Court.

Insofar as the 2nd item of the aforementioned July 19, 1973 directive of this Court is concerned, I issued a directive in my initial report of November 21, 1973 that all plaintiffs' discovery be completed not later than 6 months thereafter, i.e., by May 20, 1974. I further directed, in my November 21, 1973 report:

> "that counsel appear at a conference at my office on May 17, 1974 for a report on the progress of discovery."

Today, May 17, 1974, counsel for defendants appeared as required, but there was no appearance on behalf of counsel for the plaintiffs. I was advised, however, by counsel for the defendants that the plaintiffs had not even commenced the discovery which, per my prior directive of November 21, 1973, they were obliged to complete not later than Monday, May 20, 1974.

Since it is obvious that the plaintiffs cannot possibly complete by May 20, 1974 the discovery which they had not even commenced as of today May 17, 1974, and since it further appears that plaintiffs' counsel have once more defaulted in appearing in this court for a required hearing, thereby repeating conduct

which was previously the basis of a dismissal of this suit which was reluctantly vacated by Judge Stewart on July 19, 1973, it appears plain to me that this action should be dismissed, with costs and with prejudice, pursuant to the provisions of Rule 41(b) F.R.C.P., both for failure of the plaintiffs to prosecute this matter diligently and for failure to comply with Rule 16 F.R.C.P. in that plaintiffs failed to attend a pre-trial conference duly scheduled by this Court.

Copies of this report have been mailed to the below indicated counsel, with the direction that any objections to this report must be filed at your chambers within ten days from the date hereof.

Dated: New York, N.Y.
May 17, 1974.

Respectfully submitted,

HAROLD J. RABY
UNITED STATES MAGISTRATE

cc: DONALD M. KRESGE, ESQ.
c/o RABIN & SILVERMAN, ESQS.
80 Broad Street
New York, N.Y. 10004

FRANK GREENBERG, ESQ.
RABIN & SILVERMAN, ESQS.
80 Broad Street
New York, N.Y. 10004

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.
300 Park Avenue
New York, N.Y. 10022

MILBANK, TWEED, HADLEY & MC CLOY, ESQS.
One Chase Manhattan Plaza
New York, N.Y. 10005

LUNNEY & CROCCO, ESQS.
20 Exchange Place
New York, N.Y. 10005

cc: BURNS, KENNEDY, SHCILLING & O'SHEA, ESQS.
598 Madison Avenue
New York, N.Y. 10022

REAVIS & MC GRATH, ESQS.
One Chase Manhattan Plaza
New York, N.Y. 10005

FILED
U.S. DISTRICT COURT
JUN 13 26 PM '74
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - -x

71 Civ. 1281 (L.W.P.)

AFFIDAVIT IN RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RUSSELL E. BROOKS, being duly sworn, deposes and says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant New York Stock Exchange, Inc. (the "Exchange") and make this affidavit in response to Plaintiffs' Objections to the May 17, 1974 Report of Magistrate Raby.

2. The failure of plaintiffs' counsel to attend a pretrial conference before Magistrate Raby on May 17, 1974 is but one additional example of the "inexcusable neglect" of plaintiffs' counsel in prosecuting this action. This failure to attend the pretrial conference manifests an attitude of disrespect for this Court and the other parties to this action. If ever there were an action in which plaintiffs' counsel would have no justifiable excuse for failing to attend a pretrial conference, this action is the one.

3. The history of this action is notable only for the continued failure of plaintiffs' counsel to prosecute this action. This failure to prosecute has occurred despite extensive proceedings before this Court regarding the obligation of plaintiffs' counsel to diligently prosecute this action. Plaintiffs' counsel

have repeatedly and continually ignored this action until forced to take remedial steps to keep this action on the Court's calendar.

4. By Order dated March 1, 1973, the Court dismissed this action for lack of prosecution pursuant to General Rule 23 of this Court. Subsequently plaintiffs moved this Court to vacate the dismissal order and to restore this action to the calendar. This motion was vigorously opposed by the Exchange and the other defendants. By order dated July 19, 1973, the Court granted plaintiffs' motion to vacate the dismissal. However, in light of the inexcusable neglect of plaintiffs' counsel in diligent prosecution of this action, the Court imposed against plaintiffs' counsel personally the costs and attorneys' fees of the motion. In addition, the Court assigned this action to Magistrate Raby "for the preparation of a rigid schedule, setting forth the dates by which the parties are to complete all discovery and for the preparation of a pre-trial order."

5. By report dated November 19, 1973, Magistrate Raby awarded $750.00 to the Exchange as attorneys' fees in opposing plaintiffs' motion to vacate the dismissal of this action. This award was subsequently modified by the Court and on April 23, 1974 the Exchange received $250.00 from plaintiffs' counsel. The actual expense to the Exchange for attorneys' fees and costs relating to plaintiffs' "inexcusable neglect in prosecuting the action" totalled $1,645.25.

6. The November 19, 1973 Report of Magistrate Raby also set forth the directive that plaintiffs' discovery be completed within six months from that date. In addition, counsel explicitly were directed to report for a conference before Magistrate Raby on May 17, 1974.

7. Despite plaintiffs' counsel's failure to appear at a Special Review Calendar in January, 1973 and the subsequent

sanctions stemming from that failure to appear, despite attorneys' fees of $950.00 personally assessed against plaintiffs' counsel for failing to prosecute this action, plaintiffs' counsel again failed to attend a conference before the Court on May 17, 1974. Under these circumstances, plaintiffs' counsel's failure to attend a court appearance cannot be deemed a mere inadvertance.

8. Plaintiffs suggest that there has been no need to conduct discovery in this action since pending before the Court is a motion by defendants to dismiss this action. It should be pointed out the defendants' motions for partial summary judgment relate only to Counts 2, 3, 5 and 10 of the Complaint. Even if defendants' motions are granted in their entirety, this action would remain before the Court.

9. Plaintiffs further suggest that there has been no need for them to engage in discovery because they have access to substantial discovery in a related case. It is true that numerous depositions have been conducted by the law firm of Davis & Cox in the consolidated actions of Margaret Mary McDonnell Murphy v. McDonnell & Co., Incorporated, et al. (71 Civ. 461) and Anna M. McDonnell et al., v. The New York Stock Exchange, et al., (71 Civ. 1940). On July 11, 1971, the Exchange entered into a stipulation with plaintiffs' counsel in all three actions agreeing that discovery of common defendants in the three actions could be used in any of the actions. However, the preponderance of the deposition testimony of present and former Exchange officers and employees, in the Murphy and McDonnell actions occurred during April, May, June and the first part of July of 1973 -- the period when this action was no longer on the Court's calendar. During the period when this action had been dismissed, counsel did not represent the Exchange witnesses at the depositions as if they were being examined for purposes of this action. Consequently none of the deposition testimony from that period would be admissible evidence at the trial of this

action.

10. Defendants, their counsel, and the Court have again been, unnecessarily prejudiced by plaintiffs' failure to prosecute this action. In light of Schwartz v. United States, 384 F.2d 833 (2d Cir. 1967) the Exchange requests the imposition of costs and attorneys fees even if this action is not dismissed by the Court.

11. It is respectfully submitted that the Report of Magistrate Raby, dated May 17, 1974 should be affirmed in full and this action should be dismissed with costs and with prejudice.

Russell E. Brooks

Sworn to before me this
7th day of June, 1974.

Rosemarie D. Iovino

ROSEMARIE D. IOVINO
NOTARY PUBLIC, State of New York
No. 03-7039475
Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30 [illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS H. SEILER, being duly sworn, deposes and says:

I am over the age of 18 years and am not a party to this action.

On June 7, 1974, I served the within Affidavit in Response to Plaintiffs' Objections to Magistrate's Report on the attorneys listed below by depositing true copies thereof, securely enclosed in post-paid wrappers addressed to each of such attorneys at their respective addresses in a mailbox maintained by the government of the United States at One Chase Manhattan Plaza, New York, New York.

PROSKAUER ROSE, GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(Attys for defendant McDonnell & Co., Inc. in Receivership)

LUNNEY & CROCCO
20 Exchange Place
New York, N.Y. 10005
(Attys for defendant T. Murray McDonnell)

BURNS, KENNEDY, SCHILLING & O'SHEA
598 Madison Avenue
New York, New York 10022
(Attys for defendant Hubert McDonnell, Jr. and Edward F. Becker)

REAVIS & McGRATH
1 Chase Manhattan Plaza
New York, New York 10005
(Attys for William J. Corbett, Sr.)

Steven H Reavis

Sworn to before me this

day of June, 1974.

STEVEN L. KROLESKI
NOTARY PUBLIC, State of New York
No. 41-2205556
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1975

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71 Civ. 1281 (L.W.P.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

AFFIDAVIT IN RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT

MILBANK, TWEED, HADLEY & McCLOY
1 CHASE MANHATTAN PLAZA
NEW YORK, N. Y. 10005
212-422-2660
ATTORNEYS FOR Defendant
New York Stock
Exchange, Inc.

COPY RECEIVED

RABIN & SILVERMAN
Attorneys for Plaintiff
Date: 6/7/74
Time: 3:05 pm

RECEIVED
JUN 11 1974
CHAMBERS OF
LAWRENCE W. PIERCE, J.

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INDEX NO. 72 Civ. 1281

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

- against -

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

AFFIDAVIT IN OPPOSITION TO APPLICATION TO VACATE ORDER

REAVIS & McGRATH

Attorneys for Defendant
William J. Corbet, Sr.
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 269-7600

CERTIFICATION OF COPY

an attorney admitted to practice in the Courts of the State of New York, certifies that I have compared the within copy of

with the original and have found it to be a true and complete copy.

New York, N. Y.

, 19 .

JUL 1 1974
S. D. C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

Defendant T. Murray McDonnell's Response to Plaintiff's Objections

71 Civ. 1281 (LWP)

STATE OF NEW YORK)
) ss.:
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL J. McALLISTER, being duly sworn, deposes and says:

1. He is a member of Lunney & Crocco, attorneys for the defendant T. Murray McDonnell, and submits this affidavit in support of Magistrate Raby's report dated May 17, 1974, in which he recommended dismissal of this action on the grounds that plaintiffs failed to prosecute this matter diligently and to attend a pre-trial conference "duly scheduled by this Court".

2. When this Court vacated its order of dismissal entered February 28, 1973, it stated as follows:

> "Accordingly, the motion on behalf of plaintiffs is granted and this matter is referred to Magistrate Harold J. Raby for the preparation of a rigid schedule, setting forth the dates by which the parties are to complete all discovery, and for the preparation of a pre-trial order. The Magistrate is requested to contact the parties for these purposes. It is recommended that no further adjournments or deviations from the prepared schedule be permitted to the plaintiffs, except for extreme good cause shown."
>
> (Memorandum endorsement, Stewart, J., entered July 19, 1973).

Despite the pleas of inadvertence, plaintiffs' counsel have not shown the "extreme good cause" required to excuse their failure to attend the pretrial conference of May 17, 1974 scheduled by Magistrate Raby in his report dated November 21, 1973.

3. The alibi for missing the May 17 conference is that

counsel failed to put the date in his calendar. Two reasons were given, the first being that discovery was not taken because of a pending motion to dismiss the complaint, which if granted, would render the discovery moot. (P.4, Plaintiffs' Objections). Not only is this a non sequitur, but it is patently false since defendants' motions for partial summary judgment are addressed only to Counts 2, 3, 5 and 10. Thus, the motions could never result in a dismissal of the action in its entirety.

4. The other reason given for missing the May 17 conference was that Rabin & Silverman were not sure if the attorney of record, Donald M. Kresge, would pay the Court's assessment for attorneys' fees. (P.4, Plaintiffs' Objections). Failure to pay would result in a dismissal and again would render discovery moot. This rationale is a clear affront to the Court. In any event, neither reason constitutes "extreme good cause" as required in this case. Accordingly, plaintiffs' objections should be disregarded and the Magistrate's Report should be adopted.

5. A second point raised by plaintiffs' counsel is that they have now decided that they have all the discovery needed for their purposes, thereby seeking to avoid this Court's condemnation for their failure to comply with the "rigid schedule" for discovery set by Magistrate Raby. However, this position flies in the face of their position taken in plaintiffs' motion to vacate the dismissal order. (Mr. Kresge's affidavit, sworn to April 2, 1973). After noting that a "minimum of further discovery" should be taken (p.3), Mr. Kresge stated:

> "I further represent that if this case is restored to the Special Review Calendar, discovery will be promptly resumed and completed." (p.4)

6. One year later without any discovery of defendants, plaintiffs' counsel now claims it does not need any. Simply put, either the April 1973 statement or the May 1974 statement was made to mislead the Court. The only course open to the Court

in view of these contradictory statements is a dismissal of the action.

7. It also should be noted that the discovery which plaintiffs' counsel alludes to as being in their possession was obtained by different counsel in other actions. The use of this discovery in this action is questionable as T. Murray McDonnell never received notice nor agreed to its use. Furthermore, a review of this Court's docket shows that the only discovery sought by plaintiffs was of the New York Stock Exchange which objected thereto.

8. Apparently the discovery was obtained in McDonnell v. The New York Stock Exchange, Inc. et al., 71 Civ. 1940 (SJR). (p. 3, Plaintiffs' Objections). On June 15, 1971, the Exchange moved to consolidate that action with the instant action and one other (Murphy v. McDonnell & Co., Inc. et ano., 71 Civ. 461). Plaintiffs in this action and Murphy opposed the motion. The memorandum of law submitted by the plaintiffs herein headnotes that "(T)he actions subject to the motion are basically dissimilar." The memorandum continues:

> "It should first be noted that the gravamen of the complaint in Schwartz v. McDonnell, et al., is far different than the gravamen of the complaints in the Murphy and McDonnell litigations." (p.2)

9. The brief then compares the allegations contained in the three complaints culminating in a "table (which) summarizes the basic claims in the three complaints that do not overlap." (p.6) Three years later, however, when faced with a need to show compliance, plaintiffs' counsel magically have at their disposal discovery taken in McDonnell that is relevant and material to the instant action.

10. Needless to say, the rhetoric of plaintiffs' counsel should not convince this Court that plaintiffs or their counsel have adhered to this Court's "rigid" pretrial schedule. They

did not attend the scheduled conference, nor did they take the discovery which they represented to the Court that they needed.

11. We also understand that Frank Greenberg, the partner at Rabin & Silverman who replaced Mr. Kresge, now a resident of Ohio, is leaving New York to reside permanently in California. Once again, this action will become another attorney's stepchild, thus prejudicing defendants' rights.

12. As a final comment, plaintiffs' counsel, when seeking to have the dismissal order vacated in April 1973, noted the proposition that dismissal is appropriate:

> "when counsel was forewarned of the Court's impatience with the progress of the case, and put on notice that dismissal might be imminent. See...Slavitt v. Meader, 278 F. 2d 276 (D.C. Cir.) cert. denied, 364 U.S. 831 (1960) (prior dismissal vacated; case dismissed for a second time)." (p.14, 15, Plaintiffs' Memorandum in Support of Motion to Vacate Dismissal)

Plaintiffs also distinguished this case in April 1973 from that "where an explicit order of the court, given for the purpose of expediting the litigation, was completely disregarded by counsel." (citations omitted) (p.15, Plaintiffs' Memorandum in Support of Motion to Vacate Dismissal) In June 1974 these propostions surely apply here since plaintiffs' counsel were "forewarned of the Court's impatience" and still "completely disregarded" the May 17 conference.

13. In view of this cavalier attitude, it is respectfully requested that the Court adopt the Magistrate's Report, dated May 17, 1974 recommending dismissal with prejudice and costs. Furthermore, in light of Schwarz v. United States, 384 F.2d 833 (2nd Cir. 1967) (which was previously applied in this case by Judge Stewart), the Court should impose attorneys' fees upon plaintiffs' counsel personally due to their continued "inexcusable neglect."

Michael J. McAllister

Sworn to before me June 7, 1974.

J. Robert Lunney
Notary Public

J. ROBERT LUNNEY
Notary Public, State of New York
No. 31-7624250
Qualified in New York County
Commission Expires March 30, 1976

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK.

The undersigned being duly sworn says:

1. I am not a party to the action, am over eighteen years of age and reside at 315 East 5th Screet, New York, N.Y. 10003

2. On the 7th day of June, 1974, I served a true copy of the annexed Affidavit upon

Milbank, Tweed, Hadley & McCloy, Attorneys for Defendant, New York Stock Exchange, Inc.;

Donald M. Kresge, Esq. Attorney for Plaintiffs;

Proskauer Rose Goetz & Mendelsohn, Attorneys for Defendant, McDonnell & Co., Incorporated;

Reavis & McGrath, Attorneys for Defendant, William Corbet, Sr.;

Burns, Kennedy, Schilling & O'Shea, Attorneys for Defendants, Hubert McDonnell and Edward F. Becker

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York, located at 20 Exchange Place, New York, New York, 10005, directed to said attorneys as follows:

Russell E. Brooks, Esq., Milbank, Tweed, Hadley & McCloy, 1 Chase Manhattan Plaza, New York, New York 10005;

Donald M. Kresge, Esq., c/o Rabin & Silverman, 80 Broad Street, New York, New York 10004;

Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue, New York, New York, 10022;

Reavis & McGrath, 1 Chase Manhattan Plaza, New York, N.Y. 10005

Burns, Kennedy, Schilling & O'Shea, 598 Madison Avenue, New York, New York 10022

being the last addresses designated by said attorneys in the preceding papers served by them.

Edna Winston

Sworn to before me

June 7, 1974

Notary Public

MICHAEL J. McALLISTER
Notary Public, State of New York
No. 31-7763935
Qualified in New York County
Commission Expires March 30, 1976

202A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

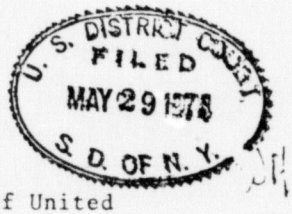
MCDONNELL & CO., INCORPORATED, et al.,

Defendants.

--------x

71 Civ. 1281 (LWP)

PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT



Plaintiffs' objections to the report of United States Magistrate Harold J. Raby dated May 17, 1974 are filed herein.

Magistrate Raby's report has recommended dismissal of this action because 1) plaintiffs' counsel inadvertently failed to attend a conference on the progress of discovery scheduled for May 17, 1974, and 2) because "it is obvious that plaintiffs cannot possibly complete by May 20, 1974 the discovery which they had not even commenced as of today May 17, 1974."

Summary of Reasons why Dismissal of this Action would be Unjust

We concede that we inadvertently failed to attend the conference before Magistrate Raby, and we sincerely apologize to the court for doing so. We have also tendered our apologies orally to Magistrate Raby subsequent to receipt of his report. We assure the court that no disrespect was intended by our actions. This conference was missed because we did not enter the date on our diary for the reasons described more fully below.

However, while there may be no justifiable excuse for the failure to attend the conference, we respectfully suggest that this failure should not be

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construed as an admission of plaintiffs' failure to commence discovery, and in the interests of justice, should not result in the drastic remedy of dismissal of this meritorious action.*

In fact, after reviewing the substantial discovery which has taken place in a related case, to which we have access, and the multitudinous documents which have already been produced, we actually concluded prior to May 17, 1974 that we needed no additional discovery of defendants, and that as far as we were concerned, the case was ready for trial. Consequently, plaintiffs were in technical compliance with that portion of Magistrate Raby's order which directed plaintiffs to complete all of their discovery by May 20, 1974.

We further submit that two other events have occurred since the last report of Magistrate Raby of November 21, 1973 both of which weigh heavily against dismissal of this action. First, plaintiffs'attorney, who was not previously associated with our firm, made a timely payment on April 23, 1973 of the $950.00 assessed against him for attorneys fees. Second, plaintiffs have vigorously opposed the motions of certain defendants to dismiss this action on various grounds, and have also cross-moved for certain relief. The motions and cross-motion were returnable on December 7, 1973 and are still pending decision by the court.

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*Plaintiffs believe this action is meritorious since defendant McDonnell & Co. Inc. consented to certain findings and an order imposing remedial sanctions by the Securities and Exchange Commission for the same acts complained of in the complaint (Exhibit A) and since a similar action by a McDonnell shareholder proceeded to trial and judgment against some of the defendants herein in the U.S. District Court for the Northern District of Illinois, Eastern Division (Mark v. McDonnell & Co. Incorporated, et al. 69 C 2646).

The Conferences before Magistrate Raby
and the actions taken by Plaintiffs Counsel

On October 4, 1973 we attended the first pre-trial conference on this case before Magistrate Raby. At that conference Magistrate Raby ruled that:

1. Defendants should submit to him their motions for taxable costs by November 8, 1973,

2. If defendants decided to move for dismissal on the grounds of the Statute of Limitations, etc., they should do so before Judge Pierce by November 21, 1973,

3. Plaintiffs' counsel should consult with Davis & Cox, Esq's., attorneys for plaintiffs in another suit against the Exchange and McDonnell & Co. Incorporated (Anna M. McDonnell, etc. vs. the New York Stock Exchange, et al, 71 Civ. 1940 (SJR)), to determine what additional discovery, if any, plaintiffs would require in this case. (By a previously executed Stipulation, plaintiffs' attorney had agreed to cooperate on discovery with the Davis & Cox firm.) During the October 4th conference we advised Magistrate Raby that Davis & Cox had conducted over 35 depositions of the Exchange and other defendants and further that hundreds of documents had already been obtained from McDonnell, the Exchange and from the Securities and Exchange Commission, and that plaintiffs had thousands of pages of testimony of the defendants in connection with other actions and proceedings, together with exhibits thereto.

At the next conference before Magistrate Raby we reported that we had contacted Davis & Cox, and estimated that in order to complete (not commence) discovery, only two or three more depositions of the Exchange would be required, and that these depositions should certainly be completed by May 20, 1974. Magistrate Raby then scheduled a hearing before him on the applications for fees on November 19, 1973, which was also attended by our firm. After the

hearing, Magistrate Raby issued his report of November 21, 1973 (Exhibit B), which recommended the assessment of fees and which, on the last page, also referred to the discovery schedule and the May 17th conference date.

During the approximately six months which elapsed since the November 21, 1973 report of Magistrate Raby, defendants made applications for fees and further made motions for dismissal. We were under the impression, apparently mistaken, that despite the discovery schedule the remaining minimal depositions of the Exchange would not take place and in fact no discovery by either side would take place until after 1) plaintiffs' attorney had personally paid the assessment of fees and costs and 2) the court had ruled on defendants' motions to dismiss and on plaintiffs' cross-motions. Accordingly, the May 17th conference date was not placed in our diary. This approach seemed reasonable since, if plaintiffs' attorney failed to remit the fees and costs, or if defendants' motions to dismiss were granted, the action would be dismissed and any discovery would be rendered useless. Our understanding was further supported by the fact that none of the defendants had initiated any discovery between November 21, 1973 and May 17, 1974 thereby reinforcing our understanding that the parties had in effect agreed to suspend discovery until the two matters of the fees and the motions were disposed of. In any event, upon fully considering the facts and circumstances of this case, we concluded prior to May 17, 1974 that plaintiffs' discovery was completed.

Since this case was referred to Magistrate Raby, plaintiffs have actively resisted the imposition of large fees against their attorney, submitting affidavits and a

brief both to Magistrate Raby and to Judge Pierce. This resulted in a reduction of the fees recommended by Magistrate Raby in his November 21, 1973 report and a timely payment of the fees of $950.00 awarded by Judge Pierce by his order dated March 29, 1974 (Exhibit C.) See copy of certificate of payment, annexed hereto as Exhibit D.

Plaintiffs further aggressively defended defendants' motions for dismissal, and in fact plaintiffs' cross-moved to dismiss the Exchange's affirmative defense of the Statute of Limitations, on the ground the defense was not asserted in the Exchange's answer and was therefore waived. The motions and cross-motion have been pending decision by the court since December of 1973.

These activities of plaintiffs' attorneys since the case was referred to Magistrate Raby, clearly indicate a continued active prosecution of the action, and are clearly inconsistent with any finding of intent to abandon the action.

If plaintiffs counsel had attended the May 17th discovery conference, the above facts would have been made known to the court, and plaintiff would have advised Magistrate Raby that, so far as plaintiffs are concerned, all discovery had been completed and the case is ready for trial.

Plaintiffs and their attorneys have expended great amount of time and money in the pre-trial preparation of this case, and in opposing the assessments of fees and certain motions of the defendants. To dismiss this meritorious action due to the inadvertent error of missing the conference before Magistrate Raby would impose an unjustly harsh remedy

on plaintiffs. We respectfully appeal to the sense of justice of this court, and respectfully pray that this action not be dismissed.

Dated: New York, New York
May 28, 1974.

Donald M. Kresge
c/o Rabin & Silverman

By: _____
Attorney for Plaintiffs
80 Broad Street
New York, New York 10004

2084

Securities Exchange Act Release No. 8863) ADMINISTRATIVE PROCEEDING
FILE NO. 3-2409

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
April [illegible], 1970

In the Matter of	
McDONNELL & CO., INC. 120 Broadway New York, New York	FINDINGS AND ORDER IMPOSING REMEDIAL SANCTIONS
(8-7300)	
T. MURRAY McDONNELL	
Securities Exchange Act of 1934 - Sections 15(b), 15A and 19(a)(3)	

In these proceedings pursuant to Sections 15(b), 15A and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act"), an offer of settlement was submitted by McDonnell & Co., Inc. ("registrant"), a registered broker-dealer and member of the New York Stock Exchange and other exchanges and the National Association of Securities Dealers, Inc., and T. Murray McDonnell, chairman of its board of directors and former president. Respondents waived a hearing and post-hearing procedures and, solely for the purpose of these proceedings or any other proceedings pursuant to Sections 15(b), 15A and 19(a)(3) of the Exchange Act and Section 203(d) of the Investment Advisers Act of 1940 and without admitting or denying the allegations in the order for proceedings or admitting any violation of law, consented to findings of willful violations and failure reasonably to supervise as alleged in such order. 1/ In addition, they consented to entry of an order revoking registrant's broker-dealer registration, with the proviso that registrant may do all that is necessary to effect an orderly liquidation of its affairs, and permanently barring McDonnell from assuming any managerial or supervisory positions with any broker-dealer without prior approval of the Commission. 2/

After due consideration of the offer of settlement, and upon the recommendation of its staff, the Commission determined to accept such offer.

On the basis of the order for proceedings and the offer of settlement, it is found that:

1. Registrant willfully violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder:

1/ The findings herein are solely for the purpose of disposing of these proceedings as against the above-captioned respondents and are not binding against any other respondent named in the proceedings. Consequently, the propriety of the activities or transactions of any other respondent as to whom these proceedings are continuing is not involved here.

2/ In a separate action, the Commission filed a complaint in the United States District Court for the [illegible]strict of New York to enjoin (CONTINUED)

a. in the offer and sale of common stock of Norsul Oil and Mining, Limited in January 1969 through persons employed in registrant's Asbury Park, New Jersey, office. Such persons made false and misleading statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading concerning, among other things, the discovery of oil on Norsul properties, properties and leases owned by Norsul, an anticipated substantial short-term increase in the market price of Norsul stock, Norsul's past and present financial condition, assets and business operations, including its lack of significant earnings, and the facts that Norsul was a Canadian corporation whose securities were not registered with the Commission and that trading in Norsul stock was suspended on the Calgary Stock Exchange and subject to a cease and desist order of the Alberta Securities Commission. In addition, such persons offered and sold Norsul stock, which was speculative and unseasoned, without having made reasonable and diligent inquiry, and in disregard of information as to the past and present financial condition and business operations of Norsul.

b. in the offer and sale of common stock of Waltham Industries Corporation from about August 1968 to July 1969 through persons employed in registrant's 400 Park Avenue, New York, office. Such persons made false and misleading statements of material facts and omitted to state material facts necessary in order to make the statements made not misleading concerning, among other things, a substantial short-term increase in the market price of Waltham stock, Waltham's past and present financial condition and business operations and its future earnings and prospects, the existence of a close relationship between certain of registrant's personnel and Waltham's management, the prospective acquisition by Waltham of a company with annual earnings of $65 million, and the substantial debt incurred by Waltham in order to acquire a smaller company in September 1968. In addition, such persons offered and sold waltham stock without having made reasonable and diligent inquiry and in disregard of information as to the past and present financial condition and business operations of Waltham, and recommended the purchase of and sold such securities to customers for whom they were not suitable in light of the customers' investment needs and objectives.

c. in inducing customers, through an employee in its Washington, D. C., office from about September 1, 1967 to about June 30, 1968, to repose trust and confidence in the employee and registrant, causing such customers to believe that they would be fairly dealt with, to engage in transactions which were excessive in size and frequency in view of the resources and character of the customers' accounts, and to open margin accounts and engage in short selling and other speculative investment practices not suitable to their investment needs and objectives, and in establishing margin accounts without customers' authorization and effecting unauthorized transactions in customers' accounts.

2. From about January 1, 1968 to date, registrant willfully violated Section 7(c) of the Exchange Act and regulations adopted thereunder by the Board of Governors of the Federal Reserve System, in that registrant, directly and indirectly, extended, maintained and arranged for credit to and for customers without collateral and on securities (other than exempted securities) in contravention of such regulations.

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2 Continued/

registrant and McDonnell from violation of the registration and anti-fraud provisions of the Federal securities laws in connection with the offer and sale of securities of the registrant. The defendants, without admitting or denying the allegations of the complaint, consented to the issuance of a permanent injunction.

3. From about October 31, 1968 to date, registrant willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that it failed to accurately make and keep current certain of its books and records including a securities record or ledger, customers' accounts, and ledgers or other records reflecting all assets and liabilities, income and expense and capital accounts, and dividends and interest received.

4. From about October 31, 1968 to date, registrant willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in that it accepted orders for the purchase and sale of securities and effected securities transactions on behalf of customers when its books and records were not current, contained numerous errors, and could not be relied upon accurately and promptly to reflect the securities or cash held for the accounts of customers, it did not have the facilities and personnel necessary in order promptly to consummate customers' securities transactions and to make prompt delivery of securities and cash to such customers, and it was not in compliance with the financial requirements imposed by the New York Stock Exchange, and in that registrant made untrue and misleading statements of material facts concerning the above matters.

5. Registrant and McDonnell failed reasonably to supervise persons under their supervision with a view to preventing the above violations.

In view of the foregoing, it is appropriate in the public interest to impose the sanctions specified in the offer of settlement.

Accordingly, IT IS ORDERED that the registration as a broker and dealer of McDonnell and Co., Inc. be, and it hereby is, revoked, provided that it may do all that is necessary to effect an orderly liquidation of its affairs, and that T. Murray McDonnell be, and he hereby is, permanently barred from assuming any managerial or supervisory position with any broker-dealer without prior approval of the Commission.

For the Commission (pursuant to delegated authority).

Orval L. DuBois
Secretary

Ex B 211A

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

HAROLD J. RABY
MAGISTRATE

Tel: 264-6218
(If no answer call 264-6454)

November 21, 1973

Donald M. Kresge, Esq.
c/o Rabin & Silverman, Esqs.
80 Broad Street
New York, N.Y. 10004

Lunney, Downey & Crocco, Esqs.
20 Exchange Place
New York, N.Y. 10005

Milbank Tweed Hadley &
McCloy, Esqs.
One Chase Manhattan Plaza
New York, N.Y. 10005

Burns Kennedy Schilling &
O'Shea, Esqs.
598 Madison Avenue
New York, N.Y. 10022

Proskauer Rose Goetz &
Mendelsohn, Esqs.
300 Park Avenue
New York, N.Y.

Reavis & McGrath, Esqs.
One Chase Manhattan Plaza
New York, N.Y. 10005

Re: SCHWARTZ v. McDONNELL & CO., INC.;
71 Civ. 1281.

Gentlemen:

I enclose herewith a copy of my report of instant date to the District Court, the original copy of which was filed this date with Judge Pierce. Any objections thereto must be filed with Judge Pierce not later than ten days from the date hereof.

Respectfully,

HAROLD J. RABY
UNITED STATES MAGISTRATE

HJR:sc
Encl.

2124.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-v-

McDONNELL & CO., INCORPORATED, et al.,

Defendants.

---

71 Civ. 1281 (LWP)

REPORT OF UNITED STATES MAGISTRATE

TO THE HONORABLE LAWRENCE W. PIERCE, U.D.S.J.:

Pursuant to your direction, the Honorable Charles E. Stewart, Jr., District Judge of this court, signed and filed an order on July 19, 1973, in which the following action was taken:

1. A motion by the plaintiff to vacate a prior dismissal order was granted, subject to the terms and conditions hereinafter set forth;

2. This case was referred to the undersigned Magistrate "for the preparation of a rigid schedule, setting forth the dates by which the parties are to complete all discovery and for the preparation of a pre-trial order";

3. Pursuant to the procedure followed in the case of Schwartz v. United States, 384 F. 2d 833, at 836, the Court imposed "the costs and attorney fees of this motion against plaintiffs' counsel personally".

The original copy of the aforementioned order is physically appended to the motion (in the form of an order to show cause) to vacate the order dismissing the complaint, which document is forwarded herewith.

In pursuance of the aforementioned directive, I held an initial conference on October 2, 1973, at which time I directed that counsel for the various defendants submit appropriate documentary data in support of their application to be reimbursed for counsel fees incurred in connection with the matter of the motion to vacate the dismissal, and the matter was thereupon adjourned until November 18, 1973, for the purpose of hearing argument by counsel on the question of counsel fees and for the additional purpose of setting a tentative schedule for the completion of discovery.

At the conference held on November 18th, I was presented with five separate applications by counsel for the respective defendants in this case, in which there was set forth the respective reports of counsel as to the amount of legal time expended in connection with the aforementioned motion to vacate the dismissal of the complaint.

Generally speaking, the amount of legal time expended by the various counsel for the defendants varies from approximately 3 hours in one case to a maximum of approximately 33 hours in another case, and the requested award of counsel fees (and disbursements) had a range between $151.25 and $1,650. The approximate totals of the demands made by counsel was $4,332.

The following points were urged by counsel for the plaintiff in opposition to the aforementioned requests made by counsel for the defendants:

1. The requested awards are contrary to the spirit of Judge Stewart's decision, in that said requested awards are punitive in nature, rather than reflecting the amount

of legal time fairly allocable to the necessary professional work in connection with opposition to the motion to dismiss;

2. Because of the relatively simple nature of the motion, the allegations by counsel that it was necessary for each counsel (except one) to devote over 17 hours to the preparation and argument thereof (and in one case 33 hours) is totally unrealistic;

3. That in the case of the defendant, New York Stock Exchange Inc., a substantial amount of the alleged legal time expended in connection with the motion was expended by a person who was not yet admitted to the bar of the State of New York and that accordingly, it was improper to place a value on that time equivalent to the value of time that might have been expended by a full-fledged member of the bar;

4. That the requested award aggregating more than $4,000 would involve a tremendous economic hardship to the plaintiff's counsel, who is not regularly engaged in the general practice of law, but who is a professor of law at Ohio National University Law School, Lima, Ohio, at a stipend of only $20,000 a year.

The contentions of plaintiff's attorney, as outlined above, are not, in my view, totally without substance. It is concededly true, for example, that a substantial amount of the claimed legal time expended on behalf of the defendant New York Stock Exchange was in fact expended by a law school graduate who was not yet admitted to the bar. It is also reasonable, I think, for plaintiff's counsel to complain

that it was unnecessary, in the case of the defendant New York Stock Exchange, to devote 33 hours of legal time in the defense of a relatively simple motion to vacate a prior dismissal. Finally, I agree fully with plaintiff's position that Judge Stewart did not intend the order awarding costs to be punitive in nature.

On the other side of the coin, I think that it is fair to say that because of the quite understandable desire on the part of the defendants to prevent the "resurrection" of an annoying piece of litigation which counsel for the defendants quite understandably believed to have been long interred, and because of the potential exposure to their clients if the litigation was "resurrected" they were justified in making a concerted professional effort to oppose the motion, even if they had a less than 50 percent chance of prevailing. Moreover, counsel for the defendants vigorously deny that their requested awards are punitive in nature and contend that the awards are fully justified by the amount of time allegedly expended by them.

In my view the charge by each counsel of an amount not in excess of $50 per hour for the time reasonably expended in the defense of the motion to dismiss (as opposed to a demand, in one case of $65 an hour) would be justified. I further feel that the expenditure of a maximum of 15 hours per counsel respecting the defense to the motion to dismiss (as opposed to one counsel's claim of an expenditure of more than 33 hours) is adequate. Moreover, because of the relatively picayune amount of the alleged disbursements I do not think that such disbursements need separate consideration here.

In the light of the above-mentioned guidelines, my recommended awards to respective counsel are as follows:

Name of Firm	Amount of Award	Number of Hours	Rate Per Hour
1. Milbank, Tweed, Hadley & McCloy, Esqs., counsel for defendant New York Stock Exchange, Inc.	*$750.00	15	$50.00
2. Proskauer Rose Goetz & Mendelsohn, Esqs., counsel for the defendant Stargatt.	50.00	1	50.00
3. Lunney, Downey & Crocco, Esqs., counsel for defendant McDonnell.	750.00	15	50.00
4. Burns Kennedy Schilling & O'Shea, counsel for defendants Becker, et al.	750.00	15	50.00
5. Reavis and McGrath, Esqs., counsel for defendant Corbet.	400.00	8	50.00
Total	$2,700.00		

I further recommend that unless the amount of the aforementioned award, to the extent confirmed by you, is paid within 60 days from the entry of the order confirming this report and unless a certificate confirming said payment is filed with me not later than the said date the Clerk shall be directed to enter judgment dismissing the complaint, with costs.

Copies of this report have been mailed to counsel this date, with the direction that any objections thereto be filed in your office not later than ten days from the date hereof.

* At the hearing, I indicated that I would recommend an award of $1,000.00, but further reflection convinces me that it would be inequitable to award this firm any more than the amount awarded to the Proskauer or Lunney firms for their services.

The following papers considered by me on this motion are forwarded herewith:

1. Order to show cause dated 4/3/73 and filed 4/4/73.

2. Motion and affidavit filed October 12, 1973 on behalf of New York Stock Exchange for award of counsel fees for Milbank, Tweed, Hadley & McCloy.

3. Affidavit sworn to October 20, 1973 in support of award of counsel fees to Proskauer Rose Goetz & Mendelsohn, Esqs., attorneys for defendant Stargatt.

4. Affidavit sworn to October 17, 1973 in support of application for counsel fees on behalf of Lunney, Downey & Crocco, Esqs., attorneys for defendant McDonnell.

5. Affidavit sworn to October 19, 1973 in support of application for counsel fees on behalf of Burns Kennedy Schilling & O'Shea, Esqs., attorneys for defendant Becker.

(There has also been filed with the Clerk of the Court an affidavit in support of an application for counsel fees to the firm of Reavis and McGrath, Esqs., counsel for the defendant Corbet, a copy of which was exhibited to me at the hearing on November 18th, but which is not forwarded herewith.)

6. Affidavit in opposition of Donald M. Kresge, sworn to November 16, 1973.

7. Plaintiffs' memorandum in opposition.

I should also state on the record that, pursuant to the directive of Judge Stewart, I directed that all plaintiffs' discovery be completed not later than six months from the date hereof, and that defendants' discovery be completed not later than September 1, 1974. I further directed that counsel appear at a conference at my office on May 17, 1974 for a report on the progress of discovery.

Dated: New York, N.Y.
November 21, 1973.

Respectfully submitted,

HAROLD J. RABY
UNITED STATES MAGISTRATE

2.81

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

- v -

MC DONNELL and COMPANY INCORPORATED, et al.,

Defendants.

71 Civ. 1281

----------x

U.S. DISTRICT COURT
FILED
APR 2 1974
S.D. OF N.Y.

APPEARANCES:

DONALD M. KRESGE, ESQ.
c/o RABIN & SILVERMAN
80 Broad Street
New York, New York 10004

Attorney for Plaintiff

APR 2 - 1974

FRANK GREENBERG, ESQ.
RABIN & SILVERMAN
80 Broad Street
New York, New York 10004

PROSKAUER, ROSE, GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

Attorneys for Defendant McDonnell & Co., Inc. (in Receivership)

MILBANK, TWEED, HADLEY & MC CLOY
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendant New York Stock Exchange, Inc.

LUNNEY & CROCCO
20 Exchange Place
New York, New York 10005

Attorneys for Defendant T. Murray McDonnell

BURNS, KENNEDY, SCHILLING & O'SHEA
598 Madison Avenue
New York, New York 10022

Attorneys for Defendants Hubert McDonnell, Jr. and Edward F. Becker

REAVIS & MC GRATH
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for William J. Corbett, Sr.

LAWRENCE W. PIERCE, D.J.

ORDER

This matter was referred to Magistrate Raby for hearing and recommendation as to the amount of defendants' costs and attorneys' fees to be assessed against plaintiff's counsel personally, related to plaintiff's motion to vacate the Order of Dismissal dated February 28, 1973. This Court has studied the Magistrate's report and the extensive submissions from the parties in response to the Magistrate's recommendation.

Given all the circumstances, and the nature of counsel's neglect, and the nature of the legal work involved in the opposition to his motion to vacate the dismissal, this Court hereby adopts so much

of Magistrate Raby's report dated November 21, 1973, as pertains to work and services expended by defendants in connection with the plaintiff's motion to vacate and modifies the assessments as follows:

	Name of Firm	Amount of Award
1.	Milbank, Tweed, Hadley & McCloy, Esqs., counsel for defendant New York Stock Exchange, Inc.	$250.00
2.	Proskauer Rose Goetz & Mendelsohn, Esqs., counsel for the defendant McDonnell & Co., Inc. (in Receivership).	50.00
3.	Lunney, Downey & Crocco, Esqs., counsel for defendant T. Murray McDonnell.	250.00
4.	Burns Kennedy Schilling & O'Shea, counsel for defendants Becker, and Hubert McDonnell	250.00
5.	Reavis and McGrath, Esqs., counsel for defendant Corbet.	150.00
	Total	$950.00

The amounts set forth above shall be paid on or before April 30, 1974, and unless a Certificate confirming said payments is filed with Magistrate Raby on or before April 30, 1974, the Clerk shall enter judgment dismissing the complaint, with costs.

SO ORDERED.

Dated: New York, New York
March 29, 1974

LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-v-

MC DONNELL AND COMPANY INCORPORATED, et al.,

Defendants.

----------x

71 Civ. 1281 (LWP)

CERTIFICATE OF PAYMENT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

FRANK R. GREENBERG, being duly sworn, deposes and says:

I am a member of Rabin and Silverman, trial counsel for plaintiffs in this action.

In accordance with the Memorandum and Order of Judge Pierce dated March 29, 1974, a true copy of which is annexed hereto as Exhibit A, I hereby certify that on April 23, 1974 I caused the following checks to be issued and sent to the following firms.

1. Milbank, Tweed, Hadley & McCloy Esqs., counsel for defendant New York Stock Exchange, Inc.	Ck.#1556	$250.00
2. Proskauer Rose Goetz & Mendelsohn Esqs., counsel for the defendant McDonnell & Co., Inc. (in (receivership).	Ck.#1557	$ 50.00
3. Lunney & Crocco, Esqs. counsel for defendant T. Murray McDonnell.	Ck.#1558	$250.00
4. Burns Kennedy Schilling & O'Shea, counsel for defendants Becker, and Hubert McDonnell.	Ck.#1559	$250.00

5. Reavis and McGrath, Esqs., counsel for defendant Corbet. Ck.#1560 $150.00

A true copy of the letter to said firms dated and sent April 23, 1974 transmitting the aforesaid checks is annexed hereto as Exhibit B.

FRANK R. GREENBERG

Sworn to before me
April 25, 1974

MICHAEL D. DIGIOVANNA
NOTARY PUBLIC, STATE OF NEW YORK
No. 52-5031595
Qualified in Suffolk County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

MCDONNELL & CO.,INCORPORATED, et al.,

Defendants.

----------x

71 Civ. 1281 (LWP)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARIA CLANDRINO, being duly sworn deposes, and says, that deponent is not a party to the action, is over 18 years of age and resides at 700 4th Avenue, Brooklyn, New York 11232.

That on the 28th day of May, 1974 deponent served the within PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT upon Milbank Tweed Hadley & McCloy, One Chase Manhattan Plaza, New York, N.Y.; Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue, New York, New York; Lunney & Crocco, 20 Exchange Place, New York, New York; Burns Kennedy Schilling & O'Shea, 598 Madison Avenue, New York, New York; and Reavis & McGrath, One Chase Manhattan Plaza, New York, New York attorneys for defendants in this action, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 28th day of May, 1974.

Maria Calandrino
MARIA CALANDRINO

FRANK R. GREENBERG
NOTARY PUBLIC, STATE OF NEW YORK
No. 60 1550150
Qualified in Westchester County
Cert. filed in New York County
Commission Expires March 30, 1975

9244.

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No. deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

Index No. 71 Civ. 1281 (LWP) Year 19

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF N.Y.

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

MCDONNELL & CO. INCORPORATED et al.,

Defendants.

PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT

RABIN & SILVERMAN

Attorneys for PLAINTIFFS

Office and Post Office Address, Telephone

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

248-6490

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

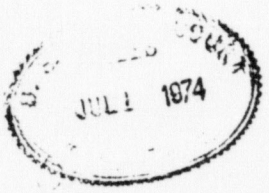
McDONNELL & CO., INCORPORATED, et al.,

Defendants.

----------x

71 Civ. 1281 (L.W.P.)

REPLY AFFIDAVIT



STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FRANK R. GREENBERG, being duly sworn, deposes and says:

I am a member of Rabin & Silverman, trial counsel for the plaintiffs in the above entitled action, and I respectfully submit this affidavit in reply to the affidavits of defendants New York Stock Exchange, T. Murray McDonnell, Hubert McDonnell and Edward F. Becker, in response to plaintiffs' objections to Magistrate Raby's report dated May 17, 1974. Defendants McDonnell & Co., Incorporated and William J. Corbet have not filed any affidavits in response to plaintiff's objections, although McDonnell & Co. did submit a one page affidavit in support of Magistrate Raby's Report.

As stated in plaintiffs' objections, plaintiffs have completed all of their discovery prior to May 17, 1974, and are now ready for trial.* By order dated March 1, 1973 the Court referred this action to Magistrate Raby "for the preparation of a rigid schedule, setting forth the dates by which the parties are to complete all discovery and for the preparation of a trial order." Magistrate Raby, in his report of November 19, 1973, directed that plaintiffs complete discovery within six months (i.e. by May 20, 1974.)

Since plaintiffs have completed their discovery

*The McAllister affidavit, par. 7 is wrong when it implies that the Exchange has moved against plaintiffs' Request for Production, and has not provided any documents requested by plaintiffs. Mr. Kresge spent numerous hours at the Exchange and obtained and paid for virtually hundreds of pages of documents.

and are ready for trial, in accordance with the direction in Magistrate Raby's report, dated November 19, 1973, and, contrary to defendants' affidavits, plaintiffs have not manifested any further neglect in prosecuting this action, this action should not be dismissed. Defendants are attempting to use plaintiffs inadvertent omission to attend the discovery conference before Magistrate Raby, as a means of quickly and cheaply disposing of a meritorious action. (In this context, it is pertinent to note that, of the various defendants' affidavits, not one of them states that the complaint does not allege a meritorious cause of action.)

A fair reading of Magistrate Raby's report recommending dismissal indicates that the principal ground upon which his recommendation is based is that plaintiffs allegedly had not completed their discovery by May 20, 1974. Since in fact we have completed such discovery the case should not be dismissed. It should also be pointed out that the original omission to attend a calendar call was by Mr. Kresge, counsel of record herein, prior to the time we were retained as special counsel. The present omission to attend the conference before Magistrate Raby was of course our fault, and while we do not minimize the seriousness of our dereliction, it is not as if the same attorneys had committed the same offense twice.

We suggest that the court ought to view with skepticism defendants' contention that plaintiffs should have conducted discovery despite the fact that defendants' motions to dismiss and to assess counsel fees were still pending. Defendants themselves have conducted no discovery. They conducted no discovery between the dates of Magistrates Raby's first and second report i.e. between November 19, 1973 and May 17, 1974. Moreover, defendants have not conducted any discovery since the May 17, 1974 report, although they have the right to do so. This is indicative of defendants own dilatory tactics, and their attempts to divert the court's attention from these tactics and plaintiffs' meritorious cause of action.

The contention made by the defendant New York Stock Exchange (the "Exchange") that despite a written Stipulation to the contrary, dated July 22, 1971 (not July 11 as stated in Mr. Brook's affidavit) none of the depositions taken in 71 Civil Action Nos. 461 and 1940 would be

admissable at trial is both incredible and irrelevant. The stipulation for joint discovery (a copy of which is annexed hereto) by its terms was unconditional. It states in pertinent part: "...a deposition so noticed and taken in the above captioned actions shall be deemed to be taken in all of said actions and may be used in each of said actions for the same purposes and to the same extent as if taken in such action". The Exchange never made their remarkable contention in the conferences before Magistrate Raby. In setting the May 20, 1974 deadline for the completion of plaintiff's discovery, plaintiff's counsel, and I am sure Magistrate Raby, both were under the impression that at least the Exchange would not contest the admissibility of the transcripts of the other depositions. The Exchange has misled plaintiffs and has perhaps misled the Court.

In any event, even if the transcripts themselves should be inadmissible (which is more properly a question for resolution at trial), plaintiffs could and would still use the transcripts as an admission against interest of the Exchange. The logical conclusion of the Exchange's further statement (Brooks' affidavit, par.9) that "counsel did not represent the Exchange's witnesses at the depositions as if they were being examined for the purposes of this action", is that the Exchange's officers would have answered the questions put to them differently if counsel thought the depositions could be used herein. This conclusion falls of its own weight. In any event,whatever the decision of the trial court on the admissibility of the Exchange's depositions, plaintiffs reiterate that they are ready for trial. Indeed, it is hardly an argument for the Exchange to make that plaintiffs are unprepared for trial. If such should turn out to be the case, plaintiffs' case will be weakened, but we are willing to bear whatever consequences may flow from our declaration of readiness for trial now, without further discovery.

The further contention of the Exchange that it has unnecessarily been prejudiced by plaintiffs' failure to prosecute this action is unsupported on this record and is totally without merit.

We once again apologize to the Court for missing the May 17th discovery conference, and reiterate that as far as plaintiffs are concerned, all discovery is completed and the case is ready for trial. To dismiss this meritorious action would be a harsh and unjust punishment for an inadvertant error.

FRANK R. GREENBERG

Sworn to before me this
14th day of June, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROBERT L. SCHWARTZ, et al., Plaintiffs, - against - McDONNELL & CO., INCORPORATED, et al., Defendants.	STIPULATION 71 Civ.1281
MARGARET MARY McDONNELL MURPHY, Plaintiff, - against - McDONNELL & CO., INCORPORATED and THE NEW YORK STOCK EXCHANGE BY ROBERT W. HAACK, President, Defendants.	71 Civ. 461
ANNA M. McDONNELL, et al., Plaintiffs, - against - THE NEW YORK STOCK EXCHANGE, et al., Defendants.	71 Civ. 1940

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned as follows:

1. The motion of defendant New York Stock Exchange, Inc. for an order consolidating for all purposes the above-captioned actions, and directing service of a consolidated complaint,

returnable August 3, 1971, shall be, and the same is hereby withdrawn without prejudice.

2. The undersigned, to the extent reasonably practicable and consistent with the interests of the parties which they represent, shall coordinate discovery under Fed.R.Civ.P. 30, 31, 33,34 and 36, to avoid duplication in the above-captioned actions. Provided, however, that none of the undersigned shall be precluded by this stipulation from conducting deposition, documentary or other discovery that they, in their sole discretion, deem necessary or advisable.

3. Notices of depositions served in any of the above captioned actions upon any defendant common to all three of the above-captioned actions pursuant to Fed. R. Civ. 30 shall be served upon each of the undersigned. Subject to such notice having been given, a deposition so noticed and taken in any of the above-captioned actions shall be deemed to be taken in all of said actions and may be used in each of said actions for the same purposes and to the same extent as if taken in such action. The foregoing shall not in any way restrict or otherwise prejudice the right of any of the undersigned to conduct or take the examination of any deponent in such manner and at such time or times as said undersigned, in their sole discretion, deem necessary or advisable.

4. Documents produced by a party who is a defendant in all three of the above-captioned actions shall be made available to the plaintiffs in all of said actions for inspection and copying and to the extent so made available shall be deemed to have been produced in all said actions.

5. The undersigned shall enter into such other and further agreements and stipulations as may be appropriate from time to time to effectuate the foregoing.

Dated: New York, New York
July 22, 1971

DAVIS & COX

By _____
A Member of the Firm
120 Broadway, Suite 3111
New York, New York 10005

Attorneys for Plaintiffs in Murphy v. McDonnell & Co., Incorporated, et ano and McDonnell et al v. The New York Stock Exchange, et al.

MILBANK, TWEED, HADLEY & McCLOY

By _____
A Member of the Firm
1 Chase Manhattan Plaza
New York, N. Y. 10005

Attorneys for Defendant
New York Stock Exchange, Inc. and such of its Governors as have been served with process

KRESGE & COHEN

By _____
A Member of the Firm
919 Third Avenue
New York, N. Y. 10022

Attorneys for Plaintiffs, Schwartz, et al., v. McDonnell & Co., Incorporated, et al.

WEIL, GOTSHAL & MANGES

By _____
A Member of the Firm
767 Fifth Avenue
New York, N. Y. 10022

Attorneys for Defendant
McDonnell & Co., Incorporated

SO ORDERED:

_____

2334.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

McDONNELL & CO. INCORPORATED, et al.,

Defendants.

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARIA CALANDRINO, being duly sworn, deposes and says:

That deponent served the within Reply Affidavit upon Milbank Tweed Hadley & McCloy, One Chase Manhattan Plaza, New York, New York; Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue, New York, New York; Lunney & Crocco, 20 Exchange Place, New York, New York; Burns Kennedy Schilling & O'Shea, 596 Madison Avenue, New York, New York; Reavis & McGrath, One Chase Manhattan Plaza, New York, New York; attorneys for defendants in this action, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

MARIA CALANDRINO

Sworn to before me
13th day of June, 1974.

MICHAEL D. DIGIOVANNA
NOTARY PUBLIC, STATE OF NEW YORK
No. 52-6031585
Qualified in Suffolk County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No. deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

2354

NOTICE OF ENTRY

Sir: - Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: — Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

Index No. 71 Civ.1281(LWP) Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF N.Y.

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-against-

McDonnell & Co., Incorprated, et al.,

Defendants.

REPLY AFFIDAVIT

RABIN & SILVERMAN

Attorneys for PLAINTIFFS

Office and Post Office Address, Telephone

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

248-6490

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

RECEIVED
JUN 14 1974
CHAMBERS OF
LAWRENCE W. PIERCE, J.

3:45 p.m.

2360A

Memo. OPINION & ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

MC DONNELL and COMPANY INCORPORATED, et al.,

Defendants.

71 Civ. 1281

#40912

----------x

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
JUL 11 10 PM '74

MICROFILM
JUL 1974

APPEARANCES:

FRANK GREENBERG, ESQ.
RABIN & SILVERMAN
80 Broad Street
New York, New York 10004

Attorney for Plaintiff

PROSKAUER, ROSE, GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

Attorneys for Defendant McDonnell & Co., Inc. (in Receivership)

MILBANK, TWEED, HADLEY & MC CLOY
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for Defendant New York Stock Exchange, Inc.

LUNNEY & CROCCO
20 Exchange Place
New York, New York 10005

Attorneys for Defendant T. Murray McDonnell

-83-82

BURNS, KENNEDY, SCHILLING & O'SHEA
598 Madison Avenue
New York, New York 10022

Attorneys for Defendant Hubert McDonnell, Jr.
and Edward F. Becker

REAVIS & MC GRATH
One Chase Manhattan Plaza
New York, New York 10005

Attorneys for William J. Corbett, Sr.

LAWRENCE W. PIERCE, D.J.

MEMORANDUM AND ORDER

In a Report dated May 17, 1974, Magistrate Raby has recommended dismissal of this ill-fated action, for failure of plaintiffs' counsel to adhere to the strict discovery schedule established by the Magistrate at this Court's direction, and for failure of plaintiffs' counsel to appear at a conference scheduled before the Magistrate on May 17, 1974. The discovery schedule and the conference date were both clearly set forth in the Magistrate's Report dated November 21, 1973.

Plaintiffs' counsel, opposing the recommendation, states that although he was aware of the directions of the Magistrate, there were two matters before the Court pending determination which led him to assume that the discovery

schedule and the conference date were suspended. The first was a recommendation by the Magistrate, included in the November 21, 1973 report, concerning costs to be assessed against plaintiffs' prior counsel in connection with past failures to prosecute the action. The second was a series of motions for partial summary judgment by various of the defendants in the action, filed soon after the Magistrate's Report. Counsel also asserts that in the interim, he has reviewed and intends to utilize discovery obtained pursuant to a Stipulation of Joint Discovery filed August 4, 1971, between counsel in two "related" actions against defendants McDonnell & Co. and the New York Stock Exchange which are pending inthis Court.[1/] He thus argues that he has in fact completed his discovery on the Magistrate's schedule, because he needs no more.

This action has been dismissed once before, by Order dated February 28, 1973, for failure to prosecute. The precipitous event was former counsel's failure to appear at a pretrial conference, called pursuant to General Rule 23 of this Court, against a backdrop of no action in this case by the plaintiffs for more than a year. A month later, when former counsel inadvertently discovered the dismissal, he moved to re-open stating that he had never

received the mailed notice of the conference.[2/] In spite of the fact that it was counsel's negligence which was responsible for his failure to appear, this Court reinstated the action by Order dated July 19, 1973, in language that put him and his successor on clear notice that plaintiffs' counsel would be required to give utmost attention to the progress of the litigation. Former counsel was personally directed to pay defendants' costs of defending against the motion to reopen.

Thus, at the time the events at issue here occurred, counsel had already exhausted the Court's tolerance for occasional lapses by attorneys, and there was good reason to know it.

Counsel now attempts to gloss over these new lapses by stating that he does not require any discovery, from any defendants, anyway. Defendants have responded that this can not be so, inasmuch as some are not parties to the related actions; others point out that they received no notice of the depositions in those actions and that nothing obtained therein can be used against them in this action.[3/] Ordinarily, a decision to waive further discovery is counsel's to make, and the Court would not second-guess him, or permit opposing counsel to do so. It is brought into question here, only

because in the total context of this action it has the appearance of being conjured up after the fact to excuse yet another failure to actively pursue this litigation. In that light it is to be noted that counsel states, almost in the alternative, that he did not proceed to discovery as directed by the Magistrate because he assumed the motions for partial summary judgment had suspended that schedule. There are circumstances under which that might have been a fair assumption, but here it defies reason. The motions deal with Counts 2, 3, 5, and 10, only. These counts involve essentially the same facts as the remaining, unattacked, counts. Thus, there was no good reason to delay discovery. The decision on the motions, one way or the other, would have little effect on the necessary or permissible scope of discovery. If counsel thought differently, he failed to share his thoughts with the Court or the Magistrate, nor did he attempt to determine the Magistrate's view as to the effect of the motions on the discovery schedule.

The same can be said of counsel's assumption with respect to the effect of the open matter of costs. Counsel may very well have had mental reservations about proceeding any further until he knew how much the continuation of the action was going to cost his predecessor. But this does not

change the fact that the Magistrate, aware of the cost issue, clearly intended that counsel should complete his discovery by May 20, 1974. If counsel felt that this was unfair at the time, or even in the interim, ordinary prudence should have led him to contact the Magistrate or the Court and request a stay of discovery until the matter was determined. As it was, he did not even attempt to confirm his unlikely assumption.

As unconvincing as these excuses are with respect to the discovery schedule, that matter is mooted now by counsel's representation that he needs no further discovery. But, he has used essentially the same arguments and assumptions to justify his failure to appear on May 17, 1974 at the conference scheduled by the Magistrate. In short, counsel as much as says that in November of 1973, when he received the Magistrate's direction, he assumed that it did not mean what it said and that, consequently, he did not enter the date of the conference in his calendar. Given the history of the case and the precarious position in which counsel was at the time, this explanation is credible only if viewed as supporting the proposition that counsel, despite his protestations to the contrary, has little regard for the Court's and the Magistrate's authority in these matters. 4/

There are few attorneys who have not inadvertently failed to note an occasional conference in their calendars. Likewise, few have not occasionally jumped to erroneous assumptions about dates established by the Court and the Magistrates. In spite of the inconvenience this causes opposing counsel and an already vastly overburdened Court, such negligence rarely leads to dismissal unless over a period of time counsel's failures amount to a pattern which, as well as constituting an affront to the Court, indicates little if any serious intention to prosecute the action.[5/] In this Court's opinion, this is such a case.

The recommendation of the Magistrate is hereby adopted and the action is hereby dismissed as against all defendants, with prejudice.

SO ORDERED.

Dated: New York, New York
June 28, 1974

LAWRENCE W. PIERCE
U. S. D. J.

FOOTNOTES

1. It should be noted that the Stipulation concerns discovery with respect to only two of the fifty-two defendants named in this action, and that the Stipulation grew out of a motion for consolidation of the three actions which was vigorously and successfully opposed by counsel for the plaintiffs in this case, on the ground that this action involves issues of fact and law which are entirely different from the issues in the other two cases.

2. The notice of the conference also appeared four times in the New York Law Journal. Counsel's failure to receive the mailed notice was attributed to the fact that he failed to notify the Clerk's Office of his change of address. The failure to follow the Law Journal was never explained.

3. The Stipulation specifically provides that "[n]otices of depositions served in any of the above-captioned actions upon any defendant common to all three of the above-captioned actions . . . [and] . . . a deposition so noticed and taken in any of the above-captioned actions shall be deemed to be taken in all of the said actions and may be used in each of said actions for the same purposes and to the same extent as if taken in such action." (Emphasis added). Counsel for defendants McDonnell & Co. and for the New York Stock Exchange (the only two defendants common to all three actions) note that during the period when this action was off the calendar as dismissed under Rule 23, the Stipulation was not in effect as to this action.

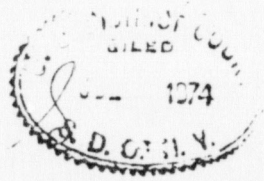
4. In this light, one last incident is worth noting. After the Court received the Magistrate's recommendation, and after plaintiff and then several defendants had filed submissions with respect to that Report, counsel for plaintiff requested permission to file a reply affidavit. On Tuesday a.m., June 11, 1974, he was informed by telephone that the request had been granted, but that his submission should be

FOOTNOTES (Cont.)

filed with the Court "by close of business Thursday." Counsel's unsworn reply "affidavit" was hand-delivered to Chambers by plaintiffs' law firm at 3:45 p.m., Friday, June 14, 1974. Such a performance, at this time, merely underscores this Court's doubt that this action could ever be diverted from the rocky course it has traveled thus far.

5. Further evidence of this attitude can be found in the fact that of the fifty-two remaining defendants in this action, only 16 have been served, the last service being made on June 12, 1971. This was brought to counsel's attention in July of 1973 when he moved to re-open the case. He has not yet moved to complete service, or to discontinue the action against the unserved defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs,

-v-

71 Civ. 1281

MC DONNELL and COMPANY INCORPORATED, et. al.,

Defendants.

----------x

ORDER

The docket in this action notes a Stipulation of Discontinuance filed October 29, 1973, "[a]s to only John J. Anglim, et. al". A search of the files has revealed that said Stipulation actually discontinued the action as to forty-two defendants, all Governors of the defendant New York Stock Exchange, Inc. Thus, footnote 5 in this Court's Memorandum and Order dated June 28, 1974, is in error. It is hereby stricken, and the Clerk is directed to amend the docket to accurately reflect the nature of the Stipulation.

Inasmuch as the facts erroneously asserted in footnote 5 were setforth merely as further corroboration, this Court's opinion is in no way altered by their deletion.

SO ORDERED

New York, New York
July 8, 1974

LAWRENCE W. PIERCE
U.S.D.J.

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RABIN & SILVERMAN

Attorneys for

Office and Post Office Address

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

To

Attorney(s) for

Docket No. 74-2081

Index No. Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT L. SCHWARTZ, et al.,

Plaintiffs-Appellants,

against

McDONNELL & CO., INCORPORATED, et al.,

Defendants-Appellees

AFFIDAVIT OF SERVICE
BY MAIL

RABIN & SILVERMAN

Attorneys for Plaintiffs-Appellants

Office and Post Office Address, Telephone

80 Broad Street

Borough of Manhattan **New York, N. Y. 10004**

248-6490

To

Attorney(s) for

Service of a copy of the within

is hereby admitted

Dated,

Attorney(s) for

3909-© 1973, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N.Y. 10004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

ROBERT L. SCHWARTZ, et al.,

Plaintiffs-Appellants,

-against-

McDONNELL & CO., INCORPORATED, et al.,

Defendants-Appellees.

----------x

Docket No. 74-2081

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

GRACE PERRATTO, being duly sworn, deposes and says: deponent is not a party to the action is over 18 years of age and resides at 136 Norwood Avenue, Staten Island, New York. On October 18, 1974 deponent served the within Appendix upon Milbank Tweed Hadley & McCloy, One Chase Manhattan Plaza, New York, N.Y., Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue, New York, N.Y., Lunney & Crocco, 20 Exchange Place,

New York, N.Y., Reavis & McGrath, One Chase Manhattan Plaza, New York, N.Y. and Burns Kennedy Shilling & O'Shea, 598 Madison Avenue, New York, N.Y., attorneys for defendants-appellees in this action by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Grace Perratto

GRACE PERRATTO

Sworn to before me
October 18, 1974

Michael D. DiGiovanna

MICHAEL D. DIGIOVANNA
NOTARY PUBLIC, STATE OF NEW YORK
No. 52-6031585
Qualified in Suffolk County
Commission Expires March 30, 1976